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4 UNITED STATES DISTRICT COURT  
5 NORTHERN DISTRICT OF CALIFORNIA

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7 RYAN HYAMS,

8 Plaintiff,

9 v.

10 CVS HEALTH CORPORATION, et al.,

11 Defendants.

Case No. 18-cv-06271-PJH

**ORDER**

Re: Dkt. Nos. 27, 32

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14 Defendants CVS Health Corporation, CVS Pharmacy, Inc., Garfield Beach CVS,  
15 LLC, and CVS RX Services, Inc.’s (together, “CVS”) motion to dismiss came on for  
16 hearing before this court on September 4, 2019. Plaintiff Ryan Hyams appeared through  
17 his counsel, Cathy Coble. Defendants appeared through their counsel, Daniel Fears.  
18 Having read the papers filed by the parties and carefully considered their arguments and  
19 the relevant legal authority, and good cause appearing, the court hereby rules as follows.

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**BACKGROUND**

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This action stems from Hyams’ former employment as a pharmacist for CVS. First Amended Compl. (“FAC”), Dkt. 22 ¶¶ 5, 13–16. The operative complaint alleges eight causes of action, each against all defendants: (1) Disparate Treatment Discrimination on the Basis of Race and/or Color in Violation of the California Fair Employment and Housing Act (“FEHA”); (2) Disparate Impact Discrimination on the Basis of Race and/or Color in Violation of FEHA; (3) Harassment on the Basis of Race and/or Color in Violation of FEHA; (4) Retaliation for Complaining of Discrimination and/or Harassment on the Basis of Race and/or Color in Violation of FEHA; (5) Failure to Prevent, Investigate, and

1 Remedy Discrimination, Harassment, or Retaliation in Violation of FEHA; (6) Intentional  
2 Infliction of Emotional Distress; (7) Negligent Infliction of Emotional Distress; and  
3 (8) Wrongful Termination in Violation of Public Policy.

4 Plaintiff was hired by CVS on December 15, 2015, after CVS acquired a pharmacy  
5 located in a San Francisco Target store where plaintiff had worked since June 2011.<sup>1</sup> Id.  
6 ¶ 18. Plaintiff “was the only Black full-time pharmacist out of 64 pharmacists in his  
7 District and over 200 pharmacists in his Region.” Id. ¶ 25. On or about May 19, 2017,  
8 plaintiff was selected by CVS for an audit of a Drug Utilization Review (“DUR”) system,  
9 although by the nature of the audit plaintiff was not informed that it was occurring. Id.  
10 ¶ 26. The audit essentially consisted of CVS creating a digital record of a fictitious  
11 patient with various ailments and drug prescriptions, designed to test pharmacists’  
12 detection of possible drug interactions. Id. ¶¶ 27–29. When undergoing the audit,  
13 plaintiff bypassed a warning screen (which he was not trained on), made notations in the  
14 patient file, and then approved the prescription. Id. ¶ 29. Plaintiff marked the physical  
15 bag containing the prescription for an in-person oral consultation regarding drug  
16 interactions. Id. ¶ 31.

17 On or about July 18, 2017, CVS contacted plaintiff regarding the DUR audit. Id.  
18 ¶ 37. Interactions between plaintiff and CVS’s human resources department ensued. Id.  
19 ¶¶ 37–45. On or about August 25, 2017, plaintiff was terminated in an in-person meeting,  
20 was told that he was the only Black pharmacist employed by CVS in his Region, and was  
21 told that he was the only individual selected for the DUR audit. Id. ¶ 45.

22 On July 3, 2018, plaintiff filed an administrative complaint with the Department of  
23 Fair Employment and Housing (“DFEH”), and he received a DFEH right-to-sue letter on  
24 the same day. Id. ¶ 60; see Defendants’ RJD, Dkt. 28, Ex. A at ECF pp. 5–7 (the “DFEH  
25 Charge”).

26 On August 21, 2018, plaintiff filed a civil complaint against CVS in the Superior  
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28 <sup>1</sup> For purposes of this motion, the facts are recounted as alleged in the operative  
complaint and are assumed to be true.

1 Court of the State of California, County of San Francisco. Dkt. 3, Ex. A. The action was  
2 removed to this court on October 12, 2018. Dkt. 1. The original complaint stated seven  
3 of the same causes of action as the FAC, but it did not state the FAC's second cause of  
4 action for disparate impact discrimination. On June 26, 2019, the parties submitted a  
5 joint stipulation to permit plaintiff to file a FAC. On June 27, 2019, the court entered the  
6 stipulated order, and plaintiff filed the FAC. Dkts. 21–22. On July 11, 2019, CVS filed an  
7 answer to the FAC. Dkt. 23. On July 30, 2019, defendants filed the present motion to  
8 dismiss the FAC's second claim for disparate impact discrimination. Dkt. 27.

## 9 **DISCUSSION**

### 10 **A. Legal Standard**

11 "After the pleadings are closed—but early enough not to delay trial—a party may  
12 move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings  
13 is properly granted when, accepting all factual allegations in the complaint as true, there  
14 is no issue of material fact in dispute, and the moving party is entitled to judgment as a  
15 matter of law. Analysis under Rule 12(c) is substantially identical to analysis under  
16 Rule 12(b)(6) because, under both rules, a court must determine whether the facts  
17 alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." Chavez v.  
18 United States, 683 F.3d 1102, 1108 (9th Cir. 2012) (internal quotation marks and  
19 citations omitted); accord Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1192 (9th  
20 Cir. 1989) ("The principal difference between motions filed pursuant to Rule 12(b) and  
21 Rule 12(c) is the time of filing.").

### 22 **B. Analysis**

23 Defendants move to dismiss under two alternate grounds. First, they move under  
24 Rule 12(b). A motion to dismiss pursuant to Rule 12(b) "must be made before pleading if  
25 a responsive pleading is allowed." Fed. R. Civ. P. 12(b). Because defendants filed an  
26 answer before asserting their Rule 12(b) defense, the Rule 12(b) motion is untimely and  
27 is therefore DENIED. See Dkt. 23 (answer).

28 In the alternative, defendants move to dismiss under Rule 12(c). The parties

1 agree that Rule 12(c) is an appropriate vehicle for defendants' motion, and the court  
2 presently considers defendants' Rule 12(c) motion.

3 Before suing for a FEHA violation, an employee must exhaust his administrative  
4 remedies by filing a timely and sufficient complaint (called a "charge") with the DFEH and  
5 receiving a right-to-sue notice. Cal. Gov't Code §§ 12960, 12965(b); Rodriguez v.  
6 Airborne Express, 265 F.3d 890, 896–97 (9th Cir. 2001). "The scope of the written  
7 administrative charge defines the permissible scope of the subsequent civil action.  
8 Allegations in the civil complaint that fall outside of the scope of the administrative charge  
9 are barred for failure to exhaust." Id. at 897 (citation omitted).

10 "Disparate treatment is the most easily understood type of discrimination. The  
11 employer simply treats some people less favorably than others because of their race,  
12 color, religion, sex, or other protected characteristic. Liability in a disparate-treatment  
13 case depends on whether the protected trait actually motivated the employer's decision.  
14 By contrast, disparate-impact claims involve employment practices that are facially  
15 neutral in their treatment of different groups but that in fact fall more harshly on one group  
16 than another and cannot be justified by business necessity. Under a disparate-impact  
17 theory of discrimination, a facially neutral employment practice may be deemed illegally  
18 discriminatory without evidence of the employer's subjective intent to discriminate that is  
19 required in a disparate-treatment case." Raytheon Co. v. Hernandez, 540 U.S. 44, 52–53  
20 (2003) (internal quotation marks, citations, and alterations omitted). "Because these  
21 claims arise from different theories, a party cannot rely on allegations supporting one to  
22 administratively exhaust the other." Lindsey v. United Airlines, Inc., Case No. 17-cv-  
23 00753-WHA, 2017 WL 2404911, at \*2–3 (N.D. Cal. June 2, 2017) (citing Brown v. Puget  
24 Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729–30 (9th Cir. 1984));  
25 accord De Los Santos v. Panda Exp., Inc., Case No. 10-cv-01370-SBA, 2010 WL  
26 4971761, at \*4 (N.D. Cal. Dec. 3, 2010) (collecting cases).

27 The parties do not dispute that plaintiff has exhausted his disparate treatment  
28 claim. The parties also do not dispute that plaintiff must separately exhaust his

1 administrative remedies with respect to his disparate impact claim in order to pursue that  
2 theory of discrimination in this civil action. Plaintiff argues that he has exhausted his  
3 administrate remedies with respect to this disparate impact theory for two reasons. First,  
4 plaintiff argues that his DFEH Charge actually asserted a discrimination claim based on  
5 disparate impact. Second, plaintiff argues that even if his DFEH Charge did not assert a  
6 disparate impact claim, a disparate impact claim is “like or reasonably related to” the  
7 assertions in his DFEH Charge.

8 **1. Whether Plaintiff’s DFEH Charge Asserted A Discrimination Claim  
9 Based On Disparate Impact**

10 First, plaintiff argues that any claim for any type of discrimination “is exhausted  
11 simply by checking the box marked ‘discrimination’ on a DFEH intake form. Opp.,  
12 Dkt. 42 at 13. Plaintiff’s argument fails. As an initial matter, plaintiff offers no evidence  
13 that he checked a box on a DFEH submission alleging “discrimination.” Instead, plaintiff  
14 submits for the court’s consideration an entirely-blank version of the form he claims to  
15 have submitted. See Dkt. 42-1, Ex. A. Although plaintiff’s counsel argues that the  
16 submitted form had a box labeled “discrimination” checked, plaintiff’s motion is not  
17 accompanied by any sworn declaration attesting to the declarant’s personal knowledge of  
18 the facts he asks the court to consider, or any other type of cognizable evidentiary  
19 submission.<sup>2</sup> Moreover, the form plaintiff provides explicitly states that submitting it to the  
20 DFEH “is not a filed complaint.” Dkt. 42-1, Ex. A at ECF p. 5.

21 Even if plaintiff had offered some evidence tending to show that he submitted an  
22 intake form with a box labeled “discrimination” checked, doing so would not alone have  
23 stated a disparate impact theory in his DFEH Charge sufficient to administratively  
24 exhaust it. Such a box could have indicated either disparate treatment or disparate  
25 impact, which the parties agree must be exhausted separately. Checking the single box  
26 is not alone sufficient to exhaust both theories. Here, that is particularly the appropriate

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28 <sup>2</sup> Plaintiff also cites an Exhibit C to his request for judicial notice, but that filing did not  
contain an Exhibit C. See Opp. at 14–15 n.3; Dkt. 42-1.

1 conclusion because the submitted intake form was supplemented by an attorney-  
2 prepared DFEH Charge replete with allegations that plaintiff was “treated differently”  
3 because of his race (DFEH Charge at 2), and a civil complaint filed soon thereafter  
4 explicitly alleging “disparate treatment” yet making no reference to disparate impact (e.g.,  
5 Complaint, Dkt. 3, Ex. A ¶¶ 69, 83, 96). Plainly, the attorney preparing the charge was  
6 specifically and solely alleging a disparate treatment theory. For the foregoing reasons,  
7 the court finds that plaintiff’s DFEH Charge did not actually assert disparate impact  
8 discrimination.

9 **2. Whether Plaintiff’s Disparate Impact Theory Is Within the Scope of the**  
10 **Administrative Investigation Which Can Reasonably Be Expected To**  
11 **Grow Out of the DFEH Charge**

12 Second, even though plaintiff’s DFEH Charge did not assert disparate impact  
13 discrimination, plaintiff could have exhausted that theory if it is “like or reasonably related  
14 to” the assertions in his DFEH Charge. “An employment discrimination plaintiff must  
15 exhaust administrative remedies, and this Court only has jurisdiction over conduct  
16 alleged in the administrative charge and conduct that is ‘like or reasonably related to’ the  
17 administrative allegations. This standard is met where the allegations in the civil suit are  
18 within the scope of the administrative investigation which can reasonably be expected to  
19 grow out of the charge of discrimination. In evaluating whether the standard has been  
20 satisfied, administrative charges must be liberally construed.” Pacle v. JPMorgan Chase  
21 Bank, N.A., Case No. 13-cv-3379-TEH, 2013 WL 5289020, at \*2 (N.D. Cal. Sept. 19,  
22 2013) (internal quotation marks and citations omitted) (citing Rodriguez, 265 F.3d at 896–  
23 97 (“These procedural requirements, as with all provisions of FEHA, are to ‘be construed  
24 liberally for the accomplishment of the purposes of FEHA.’ Cal. Gov’t Code § 12993(a).  
25 . . . This standard is met where the allegations in the civil suit are within the scope of the  
26 administrative investigation which can reasonably be expected to grow out of the charge  
27 of discrimination.”) (internal quotation marks omitted)); Sandhu v. Lockheed Missiles &  
28 Space Co., 26 Cal. App. 4th 846 (1994).

1        The parties dispute whether investigation into plaintiff's disparate impact claim—  
2        that a neutral policy of administrating audits had a disproportionate impact on African  
3        American employees—would be “reasonably expected to grow” out of plaintiff's  
4        administrative complaint.

5        The “touchstone” or “characteristic feature of a disparate-impact claim” is “the  
6        recitation of a facially-neutral employment policy.” Lindsey, 2017 WL 2404911, at \*2–3.  
7        However, a description of a policy that, “in the context presented . . . was intended to  
8        convey that Defendants were relying on that . . . [policy] as a pretext,” does not exhaust a  
9        disparate-impact claim. De Los Santos, 2010 WL 4971761, at \*5.

10       The facts alleged in the DFEH Charge unambiguously allege only a theory of  
11       direct discrimination. For example, the charge states:

- 12       • Mr. Hyams, an African-American male, was an exemplary 2-year employee  
13       of CVS Pharmacy, Inc.
- 14       • Mr. Hyams' performance evaluations reflected that he performed above  
15       expectations for CVS.
- 16       • On or about May 19, 2017, Mr. Hyams, the only African-American  
17       pharmacist employed by CVS out of 64 pharmacists in his District, was  
18       unknowingly selected for an audit by CVS.
- 19       • Mr. Hyams, who had no idea that he was being audited or that CVS could  
20       or would create a fake patient profile to entrap an African-American  
21       employee, checked the prescriptions and recognized the possible  
22       interaction.
- 23       • Mr. Hyams and other pharmacists in the company had processed this same  
24       combination of prescriptions for many other patients during his employment,  
25       without issue.
- 26       • More than three months later, on or about August 25, 2017, Mr. Hyams was  
27       wrongfully terminated, purportedly because he filled the prescription that  
28       was the subject of the May 19, 2017 audit.
- 29       • During his termination meeting, Mr. Hyams was notified that he, the only  
30       African American pharmacist employed by CVS in his District, was the only  
31       individual selected to be audited in this manner.

- 1 • This entrapment and eventual termination was the culmination of a pattern  
of practice of discrimination against Mr. Hyams based on his race.
- 2 • Throughout his employment, Mr. Hyams was treated differently than other  
3 non-African-American pharmacists.
- 4 • On one such occasion, a former supervisor cautioned Mr. Hyams against  
5 crossing his arms because, based on his appearance, he looked too  
aggressive.

6 DFEH Charge at 2–3.

7 Plaintiff's charge alleged that he was the only African-American pharmacist  
8 employed in his district, that the "fake patient profile" of the audit was pretextual and  
9 functioned to "entrap" him, and that he was "was the only individual selected to be  
10 audited in this manner." Id. Furthermore, the "entrapment and eventual termination was  
11 the culmination of a pattern of practice of discrimination against Mr. Hyams based on his  
12 race." Id. Such allegations unambiguously advance a theory that plaintiff was  
13 intentionally discriminated against and targeted because of his race.

14 Although the audit could be considered a company policy, plaintiff alleges that it  
15 was pretextual and served to entrap him. See id.; see generally Dkt. 3-1 ¶¶ 59 (alleging  
16 "false (pretextual) grounds for adverse job actions"), 131, 148. Additionally, plaintiff  
17 specifically alleged that no one else was subject to the audit. Even if the policy provided  
18 that only African Americans were subject to audit, that would not be a facially-neutral  
19 policy with a disparate impact—it would be a directly-discriminatory policy.  
20 Consequently, it would not be reasonably expected for a disparate-impact investigation  
21 (with the objective of probing a facially-neutral policy) to grow out of an administrative  
22 charge alleging only a directly-discriminatory policy. Therefore, the disparate impact  
23 theory must be dismissed for failure to exhaust administrative remedies.

24 At the hearing, plaintiff argued for the first time that five pharmacists have been  
25 terminated nation-wide based on similar audits, and three were African American.  
26 Plaintiff argued at the hearing—again, for the first time—that this new evidence  
27 demonstrates that a disproportionate percentage of African Americans were terminated

1 as a result of an audit policy. Plaintiff argues that because he investigated and was able  
2 to determine this new information,<sup>3</sup> that suggests that these alleged facts would have  
3 been revealed by the administrative agency's investigation into his charge.  
4 Notwithstanding that plaintiff did not make this argument prior to the hearing or support  
5 these new allegations with any citations to the DFEH Charge, any complaint in this  
6 action, or any evidentiary submission, these allegations only further demonstrate that the  
7 administrative complaint would not be reasonably expected to lead to an investigation of  
8 the audit as a facially-neutral policy. Plaintiff's new argument appears to be that the audit  
9 was administered to employees of multiple races, but resulted in the termination of a  
10 disproportionate number of African Americans. That flatly contracts the allegations in his  
11 DFEH Charge, which specifically alleges that plaintiff was the only individual subjected to  
12 the audit, and that he was specifically targeted for (and entrapped by) the audit because  
13 of his race. Although the new allegations might plausibly support a claim of a facially-  
14 neutral policy, they highlight the actual DFEH Charge's deficiency in this regard.

15 Plaintiff's counsel also conceded at the hearing that plaintiff was unaware of the  
16 newly-raised facts at the time the DFEH Charge was filed. That is telling. Although  
17 plaintiff may now be in the position to allege facts that could support allegations of  
18 disparate impact discrimination (the court does not take a position on that question), he  
19 plainly was not when he filed his DFEH Charge. The exhaustion inquiry assesses what  
20 plaintiff alleged in his charge, not what new facts he believes he could allege today. As  
21 such, the court finds that disparate impact discrimination is not within the scope of the  
22 administrative investigation which can reasonably be expected to have grown out of  
23 plaintiff's DFEH charge.<sup>4</sup>

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25 <sup>3</sup> The source of plaintiff's new allegations is unclear, but at the hearing it was suggested  
26 that they are based on information learned during mediation.

27 <sup>4</sup> Plaintiff also argues that defendants should be estopped from moving to dismiss  
28 plaintiff's disparate impact theory because they did not oppose plaintiff's request for leave  
to file an amended complaint stating the theory. Plaintiff's argument is unavailing.  
Defendants' stipulation does not constitute a clearly-inconsistent position from their  
present motion, nor have they derived an unfair advantage from it. See generally Kobold

1                   **3.      Whether Leave to Amend Is Appropriate**

2                   Plaintiff argues that he should be given leave to amend his complaint in this action  
3 to allow him to exhaust his disparate impact claim. Plaintiff argues that amendment  
4 would not be futile because his new administrative charge would not be time-barred  
5 because it would “relate back” to the original charge. Defendants argue amendment  
6 would be futile because the amendment would not relate back, so the civil claim would be  
7 time-barred.

8                    “[T]he relation-back doctrine is available in appropriate circumstances to render  
9 timely an otherwise untimely amendment to a charge under FEHA.” Rodriguez, 265 F.3d  
10 at 898. An amendment adding a discrimination theory relates back to a timely-filed  
11 DFEH charge asserting a different theory of discrimination when “all of the allegations  
12 were ‘based on the same operative facts.’” Id. (quoting FEHC v. County of Alameda,  
13 Sheriff's Dep't, FEHC Dec. No. 81-13, 1981 WL 30856, at \*8 (Cal. F.E.H.C. July 2,  
14 1981)). “[T]he factual allegations [of the original DFEH Charge] must be able to bear the  
15 weight of the new theory added by amendment.” Id. at 899. The court “conduct[s] its  
16 own de novo analysis of whether the amendment related back,” and is therefore not  
17 bound by an “agency's acceptance of an amended charge” for purposes of “the  
18 exhaustion analysis.” Id. at 898–99.

19                   Although, plaintiff has not filed an amended administrative charge, plaintiff's  
20 counsel has clearly explained what plaintiff would seek to exhaust with an amended  
21 charge. Plaintiff argues that he “would not seek to amend his DFEH Charge to add a  
22 discrimination claim based on a new protected category or even new set of facts; rather,  
23 his amendment merely would clarify his alternative theory of disparate impact  
24 discrimination based on the same protected categories as his original charge (race  
25 and/or color) and the same operative facts (the May 2017 test).” Opp. at 24.

26                   Plaintiff's attempt to relate his amended charge back to his original charge would  
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1 be futile. For the same reasons that the DFEH Charge would not reasonably lead to an  
2 investigation into disparate impact discrimination discussed above, the factual allegations  
3 in the charge are not “able to bear the weight of the new theory added by amendment.”  
4 Rodriguez, 265 F.3d at 899. In order to support a disparate impact allegation, plaintiff  
5 would have to allege additional facts—as plaintiff attempted to do at the September 4,  
6 2019 hearing. Because any amended charge would have to allege new facts to allege a  
7 disparate impact theory, it would run afoul of Rodriguez and consequently would not  
8 relate back to the original charge’s filing date.

9 As such, plaintiff’s request for leave to amend the civil complaint in this action in  
10 order to administratively exhaust his disparate impact claim is futile. Therefore, plaintiff’s  
11 disparate impact theory of discrimination is DISMISSED WITH PREJUDICE.

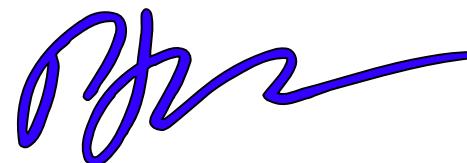
12 Because plaintiff’s disparate impact theory is dismissed with prejudice, defendants’  
13 administrative motion to extend deadlines to accommodate more discovery based on that  
14 theory (Dkt. 32) is DENIED AS MOOT.

#### 15 CONCLUSION

16 For the foregoing reasons, defendants’ motion to dismiss pursuant to Fed. R. Civ.  
17 P. 12(b) is DENIED; defendants’ motion to dismiss pursuant to Fed. R. Civ. P. 12(c) is  
18 GRANTED as explained in this order; plaintiff’s disparate impact theory of discrimination  
19 is DISMISSED WITH PREJUDICE; and defendants’ administrative motion to modify the  
20 pretrial order is DENIED AS MOOT.

21 **IT IS SO ORDERED.**

22 Dated: September 13, 2019



23  
24 PHYLLIS J. HAMILTON  
United States District Judge

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